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Supreme Court, U.S.
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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether a state agency is immune to antitrust scrutiny of its duly promulgated regulations under the state action doctrine, and therefore to compulsory examination of its officials under oath regarding the "justifications" for, and "reasonableness" of, their regulatory activities.

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IN THE
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CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Charles F. Monahan, Richard Dudley, Jeffrey Ross, Chester Babineau, Eileen Dumouchel, Anthony Lamonica, Morris Lederman, John Stallworth, and Romulus DeNicola hereby petition this Court for a writ of certiorari

to review a judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the District Court is unpublished, and is reproduced in the Appendix to the Petition (Pet. App.) at A18. The opinion of the Court of Appeals is also unpublished, and is reproduced in the Appendix at A1. Prior to the commencement of this action, the Federal Trade Commission and a single commissioner of the Commission each issued a decision. Those decisions are reproduced in the Appendix at A37 and A27, respectively.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 4, 1987. Pet. App. A39. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this matter are the Federal Trade Commission (FTC) Act, 15 U.S.C. §§ 41 et seq.; the federal antitrust laws, 15 U.S.C. §§ 1-7, 12-27, as they are enforced by the Federal Trade Commission; and Massachusetts General Laws, chapter 13, §§ 22-25, chapter 94C, §§ 1-14, and chapter 112, §§ 27-42A, 61-64. Pertinent portions of these statutes are reproduced in the Appendix. Pet. App. at A100-45. This action also involves certain regulations promulgated pursuant to state law by the Massachusetts Board of Registration in Pharmacy. The regulations are codified pursuant to the state Administrative Procedure Act in

the Code of Massachusetts Regulations, title 247, §§ 7.00(7), 7.00(14), 7.00(26), and amendments thereto. The regulations are reproduced as an appendix to the decision of the Court of Appeals. Pet. App. A12-17.

STATEMENT OF THE CASE

1. The petitioners are employees or members of the Massachusetts Board of Registration in Pharmacy. The Board is an agency of the Commonwealth of Massachusetts in the Division of Registration within the Executive Office of Consumer Affairs and Business Regulation (a cabinet-level office within the Executive Branch of the Government of the Commonwealth). The Board consists of seven persons appointed by the Governor of the Commonwealth for five-year terms. Mass.

Gen. Laws ch. 13, § 22 (1986 ed.).[1/]

The Board was created by the Massachusetts Legislature in 1885, and is mandated by law to license and regulate persons engaged in the business and profession of pharmacy.[2/] Pursuant to chapter 112, § 42A, of the General Laws, the Board is authorized to "make such rules

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1/ Section 22 stipulates that five of the members must be engaged in the drug business, of which one must be employed in "a retail drug organization operating ten or more registered retail drug stores." Of the two remaining members, one must be employed as a hospital pharmacist, and one must be a lay member.

2/ Mass. Stat. 1885, c. 313. See Mass. Gen. Laws ch. 112, §§ 24, 37 (examination and registration of pharmacists and retail drug stores); id. §§ 40, 42A, 61 (revocation and suspension of licenses); Mass. Gen. Laws ch. 94C, § 7 (registration of pharmacies and wholesale druggists to deal with controlled substances); id. §§ 13, 14 (revocation and suspension of controlled substances registrations).

and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct." Pursuant to chapter 94C, § 6, of the General Laws, the Board is empowered to "promulgate rules and regulations relative to registration and control of the manufacture, distribution, dispensing, and possession of controlled substances within the commonwealth." The Board may suspend, revoke, or cancel the licenses of persons who violate the laws and regulations pertaining to pharmacy. Mass. Gen. Laws ch. 112, §§ 27-29, 40, 42A, 61; Mass. Gen. Laws ch. 94C, §§ 13, 14.

The Board has promulgated comprehensive regulations governing retail pharmacies and the qualifications and conduct of pharmacists. One component of these regulations is a Code of Professional Conduct, which the Board adopted pursuant to Mass. Gen. Laws ch. 112, § 42A. Among the provisions of the Code in effect in 1985 were three rules (Rules 7, 14, and 26) which, respectively, proscribed claims of professional superiority and disparagement of other pharmacists, prohibited mail order pharmacy, and prohibited the collection and delivery of prescriptions in batches by unlicensed pharmacists. Pet. App. A12-17.

2. In 1985, the Federal Trade Commission commenced a series of "law enforcement investigations" into the regu-

latory activities of professional licensing boards in Massachusetts and other states, avowedly to determine whether the state boards were engaging in "unfair methods of competition" by promulgating and enforcing regulations to restrain competition. Pet. App. A44-45, A63-64.

In August, 1985, the Commission wrote to the Pharmacy Board that it had reviewed the Pharmacy Board's regulations and had identified Rules 7, 14, and 26 of the Code as rules which the Commission thought might "unreasonably restrain competition and injure consumers."[3/] The

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3/ The Commission had already commenced an investigation of the Massachusetts Board of Registration in Optometry. In July, 1985, the Commission issued a complaint against that Board, charging its members had combined or conspired to re-

(footnote continued)

Commission asked the Board to produce documents concerning the promulgation and enforcement of the regulations, and requested that its investigators be permitted to question the Board's members and its present and former executive secretaries. Pet. App. A52. The Board provided the requested documents but declined to permit Commission investigators to meet with its employees or members. Pet. App. A45, A81.

(footnote continued)

strain competition by promulgating regulations to govern advertising by optometrists. That complaint was tried before an administrative law judge and resulted, in June, 1986, in a recommendation to the Commission that the Optometry Board members be ordered to cease and desist from enforcing certain regulations. The Optometry Board's appeal of that recommendation has been awaiting decision by the Commission since December, 1986. Pet. App. A90.

In May, 1986, the Commission's investigators served deposition subpoenas upon the petitioners.[4/] The petitioners petitioned the Commission to quash the subpoenas or, alternatively, to stay its use of compulsory process pending a final decision in the proceeding against the Optometry Board. A single commissioner ruled that the Board had not established its immunity and denied the petition. Pet. App. A27, A31-32. The full Commission agreed, and denied the Board's request for review. Pet. App. A37-38.

3. The petitioners declined to comply with the subpoenas, and, in October, 1986, the Commission commenced this

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4/ The use of compulsory process was authorized by the Commission in a general resolution in November, 1985. Pet. App. A63.

action for enforcement.[5] On April 15, 1987, the District Court issued its Memorandum and Order allowing the petition. Pet. App. A18. On November 4, 1987, the Court of Appeals affirmed.[6] Pet. App. A39. On December 10, the Court of Appeals stayed its mandate pending this petition. Fed. R. App. P. Rule 41(b).

5/ The District Court's jurisdiction over the petition for enforcement was founded upon 15 U.S.C. § 49 (1982).

6/ The District Court's order was final and appealable under 28 U.S.C. § 1291. See Cobbledick v. United States, 309 U.S. 323, 330 (1940); O'Connor v. O'Connell, 253 F.2d 365, 365-67 (1st Cir. 1958). See Point IV, infra.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE FTC'S CLAIM OF AUTHORITY TO CONDUCT A "LAW ENFORCEMENT" INVESTIGATION OF A STATE REGULATORY AGENCY, AND TO EXAMINE ITS OFFICIALS UNDER OATH REGARDING THEIR REGULATORY ACTIVITIES, RAISES AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE REVIEWED BY THIS COURT.

A. The FTC's Investigation and Examination of State Officials Regarding Their Official Activities Seriously and Inappropriately Interferes With State Regulatory Programs.

The FTC has subpoenaed the members of "an agency created and operating under . . . the General Laws of . . . Massachusetts,"[7/] to give depositions under oath regarding "the procedures of the Board; the origin and history of the Regulations, including the reasons for

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7/ Pet. App. A43.

enacting, amending, and retaining the Regulations; the interpretation of the Regulations and their history of enforcement; the effect of the Regulations on competition in the sale of prescription drugs; and the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations." Pet. App. A61.

These depositions are to be taken as part of a "law enforcement investigation," the purpose of which is to determine if, by enacting the regulations, the Board "ha[s] engaged or [is] engaging in unfair methods of competition . . . by placing unreasonable restrictions on advertising or on business practices . . . ." Pet. App. A40-41, A63. The Commission asserts that the depositions of

the petitioners are necessary to determine "the justifications, if any, that may exist to support the regulations" and to obtain information about "the interpretation and enforcement of the regulations," so that the Commission may decide "whether issuance of a complaint would be in the public interest." Pet. App. A66-67.

The Court of Appeals held that the State must comply with the Commission's subpoenas because the Board's immunity under the antitrust laws depends upon whether the Board's regulatory activities are justified by "legitimate regulatory purposes," and on whether the Board's activities are "'essentially' those of private parties." Pet. App. A7-8.

The Commission's attempt to review the justifications for and reasonableness

of the Board's regulatory program, and in connection therewith to probe the involvement and intent of Board members in developing, promulgating, and enforcing regulations, directly invades state governmental functions.

First, the investigation is directed against regulations which carry the full force of statutes adopted by the Massachusetts Legislature. Pet. App. A72-74. See Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 524, 392 N.E. 2d 1036, 1040 (1979). Both the Commission's petition for judicial enforcement of its subpoenas and the decision below dispute respondents' claim of immunity by reference to a perceived need to determine the justifications for the regulations. Affidavit of Commission

Attorney Sacks, Pet. App. A65-67; Federal Trade Commission v. Monahan, Pet. App. A5-6. But inquiry into the mental processes of governmental policymakers and the justifications for regulatory actions has long been foreclosed as destructive of the lawmaking process. See National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (the "ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions."); United States v. Morgan, 313 U.S. 409, 422 (1941).

Second, the Commission's assertion of jurisdiction is premised upon its characterization of the Board as a "subordinate governmental unit." Pet. App. A5. Under the Commission's theory, its investigation is authorized because

Massachusetts has forfeited antitrust immunity by choosing to regulate the business and profession of pharmacy through regulations promulgated by the Board rather than by statutes enacted by the Legislature. However, the establishment of the Board and the delegation to it of legislative powers reflect the considered decision of the Massachusetts Legislature of how best to structure the government of the Commonwealth. See Milliken v. Bradley, 418 U.S. 717, 741 (1974) (rejecting "the notion that school district lines may be casually ignored or treated as a mere administrative convenience"); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40 (1973) ("We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse

state and local tax revenues."). The Commission's position penalizes this legislative choice.

This misguided effort to characterize the Massachusetts Pharmacy Board as a "subordinate" governmental unit also threatens to obscure the fundamental distinction in "state action" analysis between units of local government on the one hand and state government on the other. The plain and uncontroverted fact is that the Massachusetts Pharmacy Board is a state, not a local agency, and that the regulations in question were promulgated pursuant to express, legislatively delegated authority.

The mere pendency of a "law enforcement investigation" by the Commission, entailing burdensome compulsory proceedings and possible liability under the

antitrust laws,[8/] is likely to inhibit state officials from exercising their best judgment in controversial matters out of concern that their actions will be viewed inhospitably under the Commission's microscope. Cf. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 814-18 (1982). Thus, the Commission's investigation could substantially "nullify [the] state's control over its officers and agents." See Parker v. Brown, 317 U.S. 341, 350-351 (1943). Cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963) (enjoining notices by state commission to publishers of books claimed to be unsuitable for minors: "[p]eople do not

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8/ See Affidavit of Thomas A. Barnico, Pet. App. A90, describing proceedings in the Massachusetts Optometry Board case.

lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around"). The Commission is using its investigatory power against professional licensing boards in other States with just such an effect.9/

9/ Since 1984, the Commission has investigated the regulatory agencies of at least 19 states. See, e.g., In re Arizona Board of Pharmacy, FTC File No. 841-0046; In re Arkansas State Board of Dental Examiners, FTC File No. 851-0175; In re Colorado Board of Pharmacy, FTC File No. 841-0045; In re Connecticut State Board of Landscape Architects, FTC File No. 851-0022; In re Georgia Board of Pharmacy, FTC File No. 851-0012; In re Idaho State Board of Optometry, FTC File No. 851-0069; In re Idaho Board of Pharmacy, FTC No. 841-0045; In re Iowa State Board of Dental Examiners, FTC File No. 842-3204; In re Massachusetts Board of Registration in Medicine, FTC File No. 851-0011; In re Michigan Board of Pharmacy, FTC File No. 851-0089; In re Montana Board of Realty Regulation, FTC File No. 861-0054; In re New York Board of Pharmacy, FTC File No. 841-0070; In

(footnote continued)

B. The FTC's Authority to Conduct "Law Enforcement Investigations" of State Regulatory Agencies Is a Question Which Has Not Been Decided By This Court.

The Court of Appeals rejected the Board's claims that as a state regu-

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(footnote continued)

re Oregon State Board of Clinical Social Workers, FTC File No. 861-0058; In re Oregon State Board of Tax Service Examiners, FTC File No. 861-0039; In re Rhode Island Board of Pharmacy, FTC File No. 841-0125; In re Washington State Board of Funeral Directors and Embalmers, FTC File No. 851-0077; In re Wisconsin Medical Examining Board, FTC File No. 841-0211. At least three states have formally resisted compulsory process, initially at least without success. North Carolina Board of Registration for Professional Engineers and Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D. N.C. 1985); In re Colorado Board of Pharmacy, FTC File No. 841-0126. In some cases, the Commission has issued complaints and entered consent orders. See, e.g., In re Rhode Island Board of Accountancy, FTC Docket No. 9181, 50 Fed. Reg. 49064 (November 29, 1985); In re Wyoming State Board of Registration of Chiropractors,

(footnote continued)

latory agency it is either ipso facto immune to scrutiny under the antitrust laws, or immune by virtue of the Massachusetts Legislature's delegation to it of authority to regulate the business and profession of pharmacy. The court reasoned that the Board is a "subordinate governmental unit" and for that reason "enjoys antitrust 'immunity' only when it acts pursuant to a 'clearly articulated and affirmatively expressed' state policy." Pet. App. A5, citing Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), and Hoover v. Ronwin, 466

(footnote continued)

FTC File No. 861-0019, FTC Docket No. C-3176, 51 Fed. Reg. 6106 (February 20, 1986); In re Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203 (June 10, 1985); In re Louisiana State Board of Dentistry, FTC Docket No. 9188. Only one case has reached a trial before an administrative law judge. In re Massachusetts Board of Registration in Optometry, FTC Docket No. D-9195.

U.S. 558 (1984). Ignoring the Board's express statutory authority to regulate the business and profession of pharmacy, the court ruled that whether the Board is immune in relation to particular regulatory action turns on its purpose in undertaking the action. In order to determine the Board's purpose, the court said, the Commission was authorized to depose the Board members to probe their involvement and their actual intent in developing, promulgating, and enforcing the regulations. Pet. App. A6-8. Thus, because (and only because)[10/] it be-

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10/ The Commission has contended that state action immunity is not the sort of claim that can be raised in a subpoena enforcement proceeding, regardless of whether it involves factual issues. The Court of Appeals ruled on the merits of the petitioners' theory, however. See Pet. App. A4 ("The Board seems to take

(footnote continued)

lieved that there were factual questions to be answered, the Court concluded that the Board's claim that its regulations are immune from scrutiny under the antitrust laws could not be determined in a subpoena enforcement proceeding. Pet. App. A11.

The existence and scope of immunity from scrutiny under the antitrust laws are questions of legislative intent. Parker v. Brown, 317 U.S. 341 (1943). The decision of the Court of Appeals thus imputes to Congress the intent to authorize a federal agency to investigate and determine whether the actions of a state

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(footnote continued)

the view that this immunity protects its original regulations from investigation no matter how harmful to competition or to consumers they may turn out to be. This, however, is not so."). See also Argument III, infra.

regulatory agency are unreasonable or unlawful under state law, or are the product of self-interest on the part of state regulators.[11/]

In Parker v. Brown, 317 U.S. 341, 350-51 (1943), however, this Court held that the Sherman Act does not prohibit the imposition of restraints upon trade or commerce by a state acting in its sovereign or governmental capacity. The decision can and should be read to establish an immunity from antitrust scrutiny for state agencies exercising regulatory authority.[12/] However, the decision

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11/ The Court of Appeals in fact ruled that "[t]he state statutes do not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices or to inconvenience workers by making them travel farther for prescriptions." Pet. App. A6.

12/ In Parker, this Court emphasized that, although many terms of a marketing

(footnote continued)

in Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975), has caused some confusion in the lower courts on this score. In Goldfarb, this Court ruled that the State Bar Association of Virginia, a private organization which was "a state agency for some limited purposes," was not immune to antitrust scrutiny with respect to its effort to enforce minimum fee schedules for attorneys' services. And in City of Lafayette

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(footnote continued)

program for raisins under the California Probate Act were fixed by the producers, the program was authorized by state law and enforced by a state commission. 317 U.S. at 351-52. The program was immune because "it [was] the state, acting through the Commission, which adopt[ed] the program and which enforce[d] it with penal sanctions, in the execution of a governmental policy." Id. at 352.

v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978), a plurality of the Court said that "Goldfarb . . . made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." See also Hoover v. Ronwin, 466 U.S. 558, 568-69 (1984) (referring in dicta to agencies other than the legislature or supreme court as "nonsovereign state representative[s]" which are immune only if acting pursuant to a "clearly articulated and affirmatively expressed state policy"). While the Court has never held that a state regulatory agency, exercising its regulatory powers, is subject to scrutiny under the antitrust laws, these decisions appear to leave the nature and scope of a state regulatory agency's im-

munity an open question.[13/]

13/ The plurality opinion in Lafayette appears to have understood Goldfarb to sanction antitrust scrutiny of state regulatory agencies. See 435 U.S. at 411-12 & nn. 40-41. But see id. at 412-13 & n. 42 ("municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself . . ."). However, the state bar in Goldfarb was an adjunct agency of the state supreme court, not a regulatory agency in the executive branch of the state government, and the activities under scrutiny were plainly not supported by the state supreme court.

In Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985), California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Court addressed claims that private anticompetitive conduct was immunized by state action from antitrust scrutiny. Each case was decided upon the basis of whether the conduct was encouraged or mandated, and actively supervised, by the state. In Midcal Aluminum, a negative answer to these questions resulted in the invalidation of the statute as being in conflict with the antitrust laws. See also 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987). None of these cases held that a state agency must demonstrate specific legislative support of its regulatory activities.

For all of these reasons, the nature and scope of state regulatory agencies' immunity to scrutiny under the antitrust laws, and in particular to investigation by the Commission, is a question which ought to be settled by this Court.

II. THERE IS A SEVERE CONFLICT AMONG THE CIRCUITS AS TO THE NATURE AND SCOPE OF STATE AGENCIES' IMMUNITY FROM ANTITRUST SCRUTINY OF THEIR REGULATORY ACTIVITIES.

The decision of the court below, holding that a state agency's immunity from antitrust scrutiny of its regulatory activities depends upon whether those activities have a "legitimate regulatory purpose," Pet. App. A7-8, conflicts with decisions of the Ninth, Fifth, and Second Circuits.

In at least two cases, the Ninth Circuit has held that agencies within the

executive branch of state government, acting within the scope of their authority, act as the sovereign. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 875 (9th Cir. 1987) ("We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism"), quoting Deak-Perera Hawaii, Inc. v. Department of Transportation, 745 F.2d 1281, 1282-83 (9th Cir. 1984), cert. denied, 105 S. Ct. 1756 (1985). Similarly, in Limeco, Inc. v. Division of Lime of the Mississippi Department of Agriculture & Commerce, 778 F.2d 1086, 1987 (5th Cir. 1985), the Fifth Circuit held that a state operated enterprise is

ipso facto immune to antitrust attack. The First Circuit, in the decision below, and the Second Circuit disagree with this view. Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1042-43, 1044 (2d Cir. 1986) (state agency must "identify a 'clearly expressed state policy' that authorizes its actions"). See generally Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 619 n. 3 (6th Cir. 1982) (whether a policy initiated by a state agency acting under general authority can constitute state action is open question).

Of those courts holding that state agencies must demonstrate legislative support for their regulatory initiatives, the Second Circuit and the Ninth Circuit have held that it is sufficient if the

regulation is in an area delegated by law to the agency, and if, as put by the Second Circuit, "the enabling statute . . . create[s] grounds for a reasoned belief that some anticompetitive activity could be envisioned." Cine 42nd Street Threater Corp. v. Nederlander Org., 790 F.2d at 1043-44. See Patrick v. Burget, 800 F.2d 1498, 1507 (9th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987) (agency's action is immune if it is within the scope of, and contemplated by, the agency's statute, regardless of whether it was taken in good or bad faith). See also P. Areeda & H. Hovencamp, Antitrust Law ¶ 212.3, at 104 (Supp. 1986).

The decision below conflicts with the decisions of the Ninth and Fifth Circuits in its holding that state regulatory agencies acting intra vires do not

ipso facto express sovereign state policy, and so are not ipso facto immune. The decision conflicts with decisions of the Ninth and Second Circuits in that it holds that, to demonstrate clear and affirmative legislative support for its policies, a regulatory agency must demonstrate (here, to the satisfaction of a specialized federal agency) that its policies serve a legitimate regulatory purpose, are reasonable, and do not represent essentially private activities.

Because the question seriously affects the federal-state balance in the area of business regulation, and because it has caused confusion and conflict among the circuits, this Court should grant the petition. Pet. App. A6-8 and should review the Board's claim that its duly promulgated regulations are immune

under the state action doctrine from antitrust scrutiny.

III. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH DECISIONS OF THIS COURT IN CONSTRUING THE ANTITRUST LAWS TO AUTHORIZE THE FTC TO EXAMINE STATE REGULATORS UNDER OATH CONCERNING THE JUSTIFICATIONS FOR, AND REASONABLENESS OF, THEIR REGULTORY ACTIVITIES.

In rejecting the Board's argument that state regulatory agencies are ipso facto immune to investigation or prosecution under the antitrust laws in connection with their regulatory actions, the Court of Appeals decision conflicts (albeit indirectly) with decisions of this Court, including its antitrust decisions.

Parker v. Brown, 317 U.S. 341 (1943), held that the Sherman Act does not encompass state governmental action, even if

it is grossly anticompetitive. The Court drew this conclusion from the lack of evidence in the statute and legislative history that Congress intended to limit the regulatory activities of the states:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 351. See also Younger v. Harris, 401 U.S. 37, 44-45 (1971). This rule of statutory construction is settled, and has been applied many times by the Court. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242-43 (1985) (construing § 504 of Rehabilitation Act as not abrogating Eleventh Amendment immunity, there being no clear indication

of congressional intent to the contrary); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (holding for lack of contrary evidence that Developmentally Disabled Assistance and Bill of Rights Act did not create substantive rights enforceable against states); United States v. Bass, 404 U.S. 336, 349 (1971) (federal criminal statute should be construed to avoid the conclusion that state law was preempted, in absence of evidence that Congress had meant to preempt). See also L. Tribe, American Constitutional Law § 5-8 at 243 (1978).

The assumption that Congress would not casually nullify state governmental activities was given the force of a positive constitutional fact in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985). Follow-

ing Garcia, the "clear statement" rule must act both as a rule of statutory construction and as a substitute for judicial review of claims that Congress has unconstitutionally infringed state sovereignty.

Starting from the premise established by these decisions, it is not possible to arrive at the conclusion reached below. In Parker, this Court observed that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. See also Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 n. 19 (1985). It is equally true that there is nothing in the language or history of the Sherman Act to suggest that Congress

intended to restrain state agencies in their law making as distinguished from their law interpreting or enforcing activities, or to make the lawfulness of state agency action under state law a proper subject for scrutiny under the antitrust laws.[14/] Obviously, the state must act through agents. Consequently, the state's immunity to anti-

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14/ The Commission did not assert jurisdiction to investigate the lawfulness and purpose of state regulatory action until the mid-1970's. See State of California ex rel. Christensen v. Federal Trade Commission, 549 F.2d 1321, 1322 (9th Cir.), cert. denied, 423 U.S. 876 (1977). Before the Court of Appeals, the Commission tied its current position to the amendment of its Act in 1974 to extend its jurisdiction to activities "affecting" interstate commerce. One may search the amendments and their legislative history in vain for any mention of a purpose to extend the Commission's jurisdiction to state agencies, or to authorize the Commission to inquire into the reasonableness, "legitimacy", or lawfulness of state regulatory action under state law.

trust scrutiny is only meaningful to the extent that its agents acting in their official capacities share that immunity. The Court of Appeals decision posits that a state's agents are immune if, but only if, they act in accordance with clear and explicit statutory authorization. As this Court said of this theory, when it was put forward as a limitation on Eleventh Amendment immunity, "[t]he theory is out of touch with reality . . . [and] would make the law a pretense." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 107 (1984). Certainly if "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress," Parker v. Brown, supra, then a purpose to effectively

"emasculate"[15/] the state action immunity reserved by Congress also should not be read into the statute without clear statutory support. Cf. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 n. 7 (1985). (close examination of state legislature's intent "would undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny").

Furthermore, if it is assumed that Congress intended to leave state regulatory power untrammeled by the antitrust laws, then it follows under other principles of statutory construction that Congress intended also to leave state agencies (or at least regulatory agencies in the executive branch) unregulated.

15/ See Pennhurst, 465 U.S. at 106.

This is so because a state agency acting intra vires is considered to be acting as the state, see Pennhurst, supra at 100-01 & n. 11,[16/] and therefore was presumably so considered by Congress when it enacted the antitrust laws. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 & n. 66 (1982) (statutes are presumed to be consistent with existing legal principles absent evidence to the contrary).

This view of congressional intent finds support in this Court's decisions. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court held that the actions of municipalities are not as such immune to antitrust scrutiny.

16/ See also Alabama v. Pugh, 438 U.S. 781 (1978); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946).

The plurality opinion emphasized that municipalities "are not themselves sovereign." Id. at 412 & n.42, citing, inter alia, Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890). In Community Communications Co. v. Boulder, 455 U.S. 40 (1982), a majority of the Court adopted this point as the rationale for its holding that action by the city was not ipso facto immune to antitrust scrutiny. See id. at 53 ("Ours is a 'dual system of government,' Parker, 317 U.S., at 351 . . ., which has no place for sovereign cities") (emphasis in the original); id. at 54 ("Thus Parker recognized Congress' intention to limit the state-action exemption based upon the federalism principle of limited state sovereignty"). Under the Eleventh Amendment prin-

ciples relied upon in Lafayette and Boulder, state agencies, unlike municipalities, are regarded as equivalents of the state as sovereign, and therefore immune. See, e.g., Pennhurst, 465 U.S. at 100.[17/]

The court of appeals also held that the Board must show that it is engaging in its regulatory activities pursuant to a clearly expressed state policy, and

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17/ Lafayette also states that "for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign," 435 U.S. at 410, citing Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975). But that point was directed to ultra vires activities. See 435 U.S. at 409-10. This Court has cautioned against using the antitrust laws to nullify otherwise constitutional delegations of power by state legislatures. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 64-65 (1985) ("Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness").

that it may not rest upon a state policy, expressed in the statutes, giving the Board power to license, regulate, and discipline persons engaged in the business and profession of pharmacy. Indeed, the court of appeals went so far as to hold that the Board must bear the burden in each case of demonstrating that the questioned regulations were adopted and are enforced, both ostensibly and in fact, for "legitimate regulatory purposes." Pet. App. A6-7.[18/]

18/ The court also stated that, depending upon the role played by the Board members who are private pharmacists -- by statute, six out of the seven members -- the Board might be regarded functionally as a private body, and therefore be required to demonstrate "active state supervision." Pet. App. A8. Although the Court left the question of active supervision of state agencies open in Town of Hallie v. City of Eau Claire, 471 U.S. at 46 & n. 10, it held that municipalities were presumed to act in

(footnote continued)

The court's decision conflicts with this Court's decisions in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), and Southern Motor Carriers Rate Conference, Inc. v. United States, 466 U.S. 558 (1984).[19/]

(footnote continued)

the public interest and so were not required to show active supervision. The same result would seem to follow a fortiori with respect to state regulatory agencies.

19/ On this point, the Court of Appeals decision also conflicts with decisions of the Ninth and Second Circuits. See Patrick v. Burget, 800 F.2d 1498, 1507 (9th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987) (agency's action is immune if it is within the scope of, and contemplated by, the agency's statute, regardless of whether it was taken in good or bad faith), and Cine 42nd Street Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1043-44 (2d Cir. 1986) ("the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create

(footnote continued)

In Town of Hallie, the Court held that a statute authorizing municipalities to provide sewage treatment services constituted sufficient state authorization of Eau Claire's policy of tying such services to sewage collection and transportation services to exempt the city from antitrust liability, even though the statute expressly authorized neither tying arrangements nor anticompetitive conduct in general. The Court said:

> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that it intends

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(footnote continued)

grounds for a reasoned belief that some anticompetitive activity could be envisioned").

> for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

Id. at 43. Thus, the Court concluded, a state policy "to displace competition with regulation in the area of municipal provision of sewage services" was established by a statute authorizing municipalities to provide such services, and was sufficient to exempt anticompetitive municipal conduct not specifically authorized by statute from challenge under the antitrust laws. Id.

Similarly, in Southern Motor Carriers, the Court held that common carriers which join together to propose rates to a state ratemaking agency are protected by the state action doctrine

from liability under the antitrust laws, even though collective action was not compulsory or even specifically permitted by state statute. The Court said it was enough that the state had determined that rates would be fixed by a regulatory agency rather than the market:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Id. at 64.

The Massachusetts Legislature established the Pharmacy Board to license and discipline the business and profession

of pharmacy. Although the Legislature provided much guidance in the statutes, it delegated power to the Board to promulgate substantive rules to govern the professional conduct of those licensed by the Board. While the Court of Appeals appears to have thought that the Board's authority to license, regulate and discipline did not sufficiently demonstrate a legislative policy to supplant competition, professional licensing programs have long been criticized on the ground that they unreasonably interfere with business decisionmaking.[20/]

20/ Indeed, such arguments at one time were adduced as a basis for invalidating parts of state licensing schemes under the Due Process Clause. Ligett Co. v. Baldridge, 278 U.S. 105 (1928) (business may be regulated only if the regulation "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general wel-

(footnote continued)

Since in establishing this regime of law, the Massachusetts Legislature manifestly intended to displace competition in pharmacy with regulation, the Board's regulations, whether or not specifically authorized by statute,[21/] are immune to antitrust scrutiny under Town of Hallie and Southern Motor Carriers.

(footnote continued)

fare"), overruled, North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973). A theory which this Court has called "a derelict in the stream of the law," id., ought not to be salvaged and reflagged under the banner of the antitrust laws without a clearer signal from Congress that such is its intent.

21/ In fact, however, the Board's regulations are closely linked to specific statutory provisions, as the Board demonstrated below. Pet. App. A75-79.

IV. THE BOARD'S CLAIM OF IMMUNITY FROM ANTITRUST SCRUTINY UNDER THE STATE ACTION DOCTRINE IS APPROPRIATE FOR DECISION IN THIS SUBPOENA ENFORCEMENT PROCEEDING.

Petitioners do not doubt the power of the Commission to investigate matters which fall within the broad statutory authority conferred by its Act, 15 U.S.C. § 45(a). Pet. App. A3-4. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-209 (1946). But Congress has not given the Commission power to compel compliance with its own subpoenas. Instead, it has directed the Commission to apply to the federal district courts for enforcement. 15 U.S.C. § 46. Nor are the courts restricted to a ministerial role in subpoena enforcement proceedings. Oklahoma Press Publishing Co. v. Walling, 327 U.S.

at 216-17 & n. 57. Subjects of the Commission's investigations "may and should have protection from unlawful demands made in the name of public investigations." United States v. Morton Salt Co., 338 U.S. at 652. The courts may hear and decide "[t]he issues of authority to conduct the investigation, relevancy of the material sought, and breadth of the demand . . . ." Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 217 n. 57. See Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 305-07 (1924). A claim of "absolute or universal immunity" from the provisions of the statute said to authorize an investigation is an "appropriate defense" to a subpoena enforcement proceeding. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 208, 211-212

(discussing Myers v. Bethlehem Corp., 303 U.S. 41 (1938)). See also Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 174 (1927).

The issue presented in this petition is well-suited for determination at this time. The state action doctrine established in Parker v. Brown, 317 U.S. at 350-52, and refined in subsequent decisions of this Court protects state governmental action from scrutiny under the federal antitrust laws. "The only requirement is that the action be that of 'the State acting as a sovereign.'" Hoover v. Ronwin, 466 U.S. 558, 574 (1984), quoting Bates v. Arizona State Bar, 433 U.S. 350, 360 (1977). The issue is thus clear. Cf. McKart v. United States, 395 U.S. 184, 194 (1969) (courts should not interfere with agency unless

it has "clearly exceeded its jurisdiction."). Moreover, this Court has previously decided a similar, but more complex, claim in a subpoena enforcement proceeding. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 208 (1938) (newspaper publisher claimed "total immunity" under the first and fourth amendments to subpoena enforcement proceedings under the Fair Labor Standards Act). See also United States v. Morton Salt Co., 338 U.S. at 647-651.

The Board's claim should not be put off. The state action doctrine as it pertains to the liability of state regulatory agencies to prosecution (or civil suit), is surely not, as the Commission ruled, merely a "substantive defense" which may be raised only after the Commission issues a complaint alleging a

violation of the antitrust laws. Pet. App. A30. Rather, it is by nature a shield against federal antitrust investigation itself. See Hoover v. Ronwin, 466 U.S. 558, 567-568 (1984) (state actors "are exempt from the operation of the antitrust laws"); Community Communications Co., Inc. v. City of Boulder, 455 U.S. at 51 (state actors are "exempt from antitrust scrutiny").

It cannot reasonably be maintained that Congress, while excluding state action from scrutiny under the federal antitrust laws out of respect for principles of federalism, id. at 54, nevertheless authorized the compulsory examination of state officials under oath before a federal tribunal concerning their official conduct, in order to determine whether they shall be subject to the

antitrust laws. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 553 & n. 16, 105 S.Ct. 1005, 1019 & n. 16 (1985) ("the states . . . have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause," citing Sherman Act, as construed in Parker v. Brown, as one example). The same congressional respect for state autonomy which animated Parker also stands against judicial tolerance of the Commission's unlawful investigation. Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial

resolution of the controversy over the [National Labor Relation] Board's power.")

The Commission's subpoenas serve no lawful purpose because there are manifestly no circumstances under which the information gained through the contemplated investigation could justify an enforcement action against the Board or the petitioners under the Federal Trade Commission Act. Cf. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975) ("The subject of any inquiry [by Congress] always must be one 'on which legislation could be had'"), quoting McGrain v. Dougherty, 273 U.S. 135, 177 (1927). Nor does the question of statutory interpretation of which petitioners seek review implicate the discretion or expertise of the Commission. See McKart v. United States, 395

U.S. 185, 197-199 (1969).[22/] As petitioners have exhausted all administrative remedies which are available to quash the subpoenas and the Commission has had a full opportunity to express its views on the scope of its authority to investigate and consider enforcement actions against state agents like petitioners, this Court should grant review of the important question presented. See id. at 204-207 (White, J., concurring in the result).

22/ A decision of this Court denying enforcement of the subpoenas in this matter would not affect the Commission's authority in the vast majority of cases in which private parties claim state action immunity by reason of their conformity with governmental directives. Cf. id. at 200.

CONCLUSION

The decision below holds that the Commission may examine the members of the Massachusetts Board of Registration in Pharmacy under oath to determine the justifications for and the reasonableness of their regulatory activities, in connection with a "law enforcement investigation" of the Board's regulations. Although this Court has not resolved the question thus decided, the Court of Appeals arrived at its decision by means which clearly conflict with the decisions of this Court, as well as the decisions of the Ninth, Fifth, and Second Circuits. Moreover, the effect of the decision is to trammel state regulatory authority without clear congressional warrant.

For these reasons, the Court should grant the writ of certiorari, and should

review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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